DEPARTMENT OF JUSTICE

DISPELLING THE MYTHS SURROUNDING INFORMATION SHARING

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INTRODUCTION

Since the inaugural Cartel Workshop held in Washington D.C. in October 1999, enforcers from around the world have gathered together each year to share best practices and new ideas for fighting cartels. In addition to providing a forum for the exchange of experiences, these workshops have provided the opportunity for enforcers to develop contacts and lasting relationships with one another. These contacts have led to a network of cooperation and coordination among competition authorities that was not remotely possible five years ago. For example, the United States and several other competition authorities recently conducted simultaneous searches and drop-in interviews in launching parallel cartel investigations. The raids involved the highly coordinated conduct of more than one hundred investigators operating in eight countries. The suspects were taken completely by surprise and incriminating documents were seized by investigators around the world.

Unfortunately, the incriminating documents seized by the investigators could not be shared among the authorities. While competition authorities have improved their ability to coordinate investigative strategies, our ability to share the fruits of our parallel investigations for the most part has not progressed and remains unreasonably restricted. These limitations are damaging the ability of competition authorities to crack international cartels and to hold cartel members responsible for their offenses.

International cartels understand the importance of the timely sharing of critical information. If we are to be successful in the fight against cartels, then we must beat cartels at their own game. We must share leads and information. We must coordinate our investigative strategies. We must ensure the element of surprise so that we can simultaneously seize evidence

in multiple jurisdictions before it can be concealed or destroyed. We must gain access to witnesses and evidence located outside our borders. International borders cannot serve as barriers to our ability to investigate. There can be no safe harbors from which cartel members can operate.

The Antitrust Division, like competition authorities around the world, strongly supports improving the ability of governments to share information in the investigation of hardcore cartels. Consumer groups and even some members of the private antitrust bar take a similar position. On the other hand, many business groups, although by no means all, take a different view. They advocate a more cautious approach that creates unreasonable barriers to information sharing in cartel cases; barriers that do not exist when governments exchange information to investigate other financial offenses, such as fraud, tax, or securities violations.

Let me give you an example. The OECD has for many, many years been encouraging improved information sharing between competition authorities. In an effort to further the debate, the OECD has repeatedly invited the Business and Industry Advisory Committee (BIAC) to the OECD to participate in these working group discussions. While some progress has been made, to date BIAC and the member countries have failed to reach a consensus on many of the most salient points. BIAC is not alone. Other business groups say that they support vigorous enforcement of the antitrust laws, yet promote restrictions on information sharing that undermine the ability of enforcers to share evidence of cartel violations. Improved information sharing and effective anti-cartel enforcement should be a common goal not just of the enforcement community, but of the business community as well.

At the core of the resistance to improved information sharing is a set of attitudes and assumptions that downplay the harm caused by hardcore cartels and overstate the potential for the misuse of exchanged information. This paper identifies five misconceptions or myths that are commonly advanced for restricting, and in some cases even prohibiting, information sharing between antitrust enforcers. It is important to reveal these beliefs as myths so that they do not unfairly distort the debate on drafting new laws to improve information sharing.

MYTHS AND MISCONCEPTIONS SURROUNDING INFORMATION SHARING

- *Myth I: Information Sharing In The Investigation Of Hardcore Cartels Should Be Treated Differently Than Other Financial Offenses*

Many competition authorities do not have the ability to utilize treaties and other cooperation agreements to share the type of information routinely exchanged among investigators of fraud, tax, security, or other financial offenses. The myth is that the distinction between hardcore cartel behavior and other acts of fraud is justified. Some business groups have insisted on special "safeguards" to restrict information sharing between governments in cartel investigations that would never be present in the sharing of information in fraud or other financial offenses. The myth stems from a belief that hardcore cartels are mere "gentlemanly agreements" that should be treated with velvet gloves and worthy of a special exemption from normal investigative techniques.

However, cartel offenses are no different than other crimes of deceit or fraud. Cartel members cheat their customers out of honest competition, and they pad their pockets with the profits of their conspiracy. The members of these cartels know what they are doing is illegal, but

they are not deterred. Instead, they go to great lengths to conceal their conduct. If we are to deter it, if we are to detect it, if we are to punish it, then we must use every investigative tool available to law enforcement. If antitrust enforcers are to beat cartels, we must share information in the investigation of hardcore cartels as law enforcers do in the investigation of other financial crimes. Any special restriction that would apply only to information sharing on cartel investigations but would not apply to other financial crimes is unjustified. Any suggestion that hardcore cartels deserve special treatment is a myth.

- *Myth II: Increased Information Sharing Will Lead To The Rampant, Uncontrolled Exchange Of Sensitive Confidential Business Secrets*

The second myth is the often repeated fear that strict prohibitions on information sharing among enforcers are required to prevent the rampant, uncontrolled exchange of sensitive, confidential business secrets. This concern is simply misplaced. A document may be *sensitive* because if revealed it could expose a company to dire penalties. It may be *confidential* because its creator never meant for it to be seen by government authorities. And, it may contain *secrets* that implicate the author and others in hidden conduct. That, however, does not make the document a sensitive, confidential *business* secret. It just means that it is evidence of a crime. Preventing governments from exchanging this evidence does not protect sensitive trade secrets. It just protects a cartel member from being held accountable for its offense.

Unfortunately, as a consequence of the restrictions advocated by some business groups, most competition authorities are not entrusted with the discretion to differentiate between handwritten notes of a cartel meeting and a sensitive trade secret. So, the "smoking gun" document discovered secretly stored away in a conspirator's attic is treated as if it were the

secret formula for Coca Cola. That makes no sense. Laws that unreasonably restrict the ability of governments to share information put competition authorities in the position where they possess unequivocal written proof that other countries were victimized by an international cartel and yet are prohibited from sharing that information, much less the actual document, with other governments.

To be clear, what competition authorities look for is any evidence of meetings or communication between competitors regarding pricing, customers, markets, or sales volumes. This evidence is commonly found in handwritten notes, e-mails, calendars, expense reports, phone logs, trade association minutes, and the like. The key types of information we rely upon to investigate cartel conduct is notably different than the information sought in connection with the review of a proposed merger. For example, whereas prospective business plans or sensitive trade secrets may be invaluable in connection with the review of a proposed merger, they would not be typically exchanged in connection with a cartel investigation where the emphasis is not on prospective business forecasts but rather on historic pricing decisions. Therefore, the proposition that special safeguards are required in cartel investigations to prevent the rampant exchange of business trade secrets is misguided.

- *Myth III. Strict Protections On Information Sharing Must Be Imposed Because There Is A High Risk of Misuse Or Leaks Of Shared Information*

The third myth relates to the perceived threat that confidential business secrets will be misused or leaked by the requesting authority to third parties. The fact is that the Division knows of no instance, or even an allegation, of a misuse or leak of confidential business information shared between competition authorities. Our invitation to BIAC and others to identify examples of such transgressions has gone unanswered. Indeed, by virtue of being charged with promoting competition, antitrust authorities have every incentive to keep confidential business information from falling into the wrong hands. This incentive is the same whether the antitrust authority is conducting a merger review or investigating hardcore cartel activity.

- *Myth IV: Unchecked Information Sharing Threatens The Continued Success Of Leniency Programs*

The fourth myth relates to the claim that information sharing will damage leniency programs. BIAC advanced this argument in its October 2003 paper submission to the OECD when it claimed that the broad restrictions in information sharing it proposed were necessary to protect the future integrity of leniency programs. However, this claim ignores the fact that jurisdictions with leniency programs have already uniformly adopted policies that protect leniency applicants from the unauthorized disclosure of their information, and it certainly does not serve as a basis for justifying further limitations on information sharing outside of the leniency context.

The Antitrust Division's Confidentiality Policy. Leniency applicants have control over the flow of *their* information between governments. The Antitrust Division's policy is to treat as confidential the identity of leniency applicants as well as any information they provide. Thus, the Antitrust Division will not disclose a leniency applicant's identity, absent prior disclosure by or agreement with the applicant, unless authorized by court order. Consistent with this policy, the Antitrust Division has adopted a policy of not disclosing to foreign authorities, *pursuant to cooperation agreements*, information obtained from a leniency applicant unless the leniency applicant agrees first to the disclosure.[1]

Any country that is considering a leniency program will immediately face the issue of confidentiality because, invariably, one of the first questions it will receive is whether an applicant's information can be shared with another agency and used against it. Since the Antitrust Division announced its confidentiality policy, to my knowledge every jurisdiction that has considered the issue has adopted a similar policy.

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[1]For more information on the requirements and application of the Division's Amnesty Program, see, Antitrust Division, U.S. Department of Justice Corporate Leniency Policy (1993), *available at* http://www.atrnet.gov/subdocs/0091.htm.; "The Corporate Leniency Policy: Answers To Recurring Questions," speech by Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, before ABA Antitrust Section 1998 Spring Meeting (April 1, 1998), *available at* http://home.atrnet.gov/subdocs/1626.htm; "Making Companies An Offer They Shouldn't Refuse," speech by Gary R. Spratling, before Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (February 16, 1999), *available at* http://www.atrnet.gov/subdocs/2247.htm; "Detecting And Deterring Cartel Activity Through An Effective Leniency Program," speech by Scott D. Hammond, before International Workshop on Cartels (November 21-22, 2000), *available at* http://home.atrnet.gov/subdocs/9928.htm; "When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?," speech by Scott D. Hammond, Fifteenth Annual National Institute On White Collar Crime (March 8, 2001), *available at* http://home.atrnet.gov/subdocs/7647.htm.

The leniency confidentiality policy gives applicants a measure of control over investigations that might strike some as problematic. However, the confidentiality policy is a necessary inducement to encourage leniency applications. If jurisdictions shared information obtained from an amnesty applicant with other competition and prosecuting authorities without the applicant's permission, then it would create a significant disincentive to entering the leniency program that would lead to fewer leniency applications. Such a result would not be in anyone's interest. First, lost applications would mean that no one would have the information and the conduct would go unpunished. Second, it is important not to lose sight of the fact that amnesty applications lead to cases against other cartel members that result in public filings detailing aspects of the cartel conduct that can assist other competition authorities as well as victims to develop their own cases, even if they do not have direct access to the leniency applicant's information.

The Antitrust Division's Waiver Policy. In practice, the confidentiality policy does not bar cooperation when a leniency applicant approaches multiple competition authorities seeking leniency for its participation in an international cartel. In such cases, leniency applicants routinely consent to the sharing of information between jurisdictions where they have obtained conditional leniency, so that those jurisdictions may conduct coordinated investigations. Just as it has become the norm that companies will simultaneously seek leniency in the United States, the EC, and Canada, applicants commonly consent to a "waiver" to allow the sharing of their information between the jurisdictions where they have sought leniency. Thus, we routinely discuss investigative strategies and coordinate searches, service of subpoenas, drop-in interviews, and the timing of charges with the EC, Canada, and others in order to avoid the

premature disclosure of an investigation and the possible destruction of evidence.

Conversely, the absence of an effective leniency program in a given jurisdiction will severely limit its ability to participate in coordinated raids sparked by leniency applications. Leniency applicants will not grant waivers to allow the sharing of incriminating information with jurisdictions where leniency is not available. As more nations adopt leniency programs and vigorously go after companies (and individuals) who fail to report cartel conduct when they had the chance, we will see companies seeking amnesty from, and granting waivers to, more and more countries.

- *Myth V. Business And Trade Groups Do Not Support Enhanced Cooperation Between Foreign Governments Because They Fear Vigorous And Effective Enforcement Of The Antitrust Laws*

The last myth I want to address is the assertion that business groups do not support enhanced cooperation between foreign governments because they fear vigorous and effective enforcement of the antitrust laws. Is this fact or fiction? I say it is a myth or, at the very least, it should be one. It just makes no sense that honest businesses operating in a free market economy would not favor strong cartel enforcement. Why? Because businesses are usually the first to feel the pain caused by cartel activity. Of course, they may try to pass along price increases to their customers and, ultimately, to consumers, but that will not always be successful. Take, for example, the worldwide cartel that operated in the graphite electrodes market that was cracked with the help of a leniency applicant. Graphite electrodes are used in steel mills to melt scrap steel. Over a five-year period, the major producers conspired to fix the price and allocate market shares for graphite electrodes sold worldwide. The conspirators were successful in raising prices

nearly 60 percent during the life of the cartel before it was ended abruptly by the Antitrust Division's investigation. Now, were the tens, if not hundreds, of millions of dollars of illicit overcharges paid by the steel makers for fixed graphite electrodes passed on by the beleaguered steel makers to their customers? Given the depressed nature of the steel industry, I very much doubt it. The bottom line is a business is far more likely to be the victim of a cartel than a member of one.

CONCLUSION

Improved information sharing, just like effective anti-cartel enforcement, should be a common goal of enforcers and the business community alike. It is, of course, important to carefully review attempts to draft new laws and agreements to improve the ability of enforcers to share leads and information. However, opposition to such improvements should be based on facts not fiction. The stakes are too high. Unreasonable restrictions on information sharing that apply only to cartel investigations do far more harm than good to the international business community.